Filed 1/29/19 P. v. Gaines CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
LEONARD JAMES GAINES et al.,
Defendant and Appellant.

A150170

(San Mateo County
Super. Ct. No. SC080433)

ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:[*]

The Court has considered the petitions for rehearing filed by appellant Rodney L. Mitchell on January 17, 2019, and by appellant Raymond L. Bradford on January 23, 2019. Rehearing is denied.

It is ordered that the unpublished opinion filed herein on January 10, 2019, be modified as follows:

1. On page 2 of the slip opinion, the first sentence of the first full paragraph (which begins with "On January 16, 2013. . . .") is omitted, and the following sentence is entered in its place:

[*] Before Jones, P.J., Needham, J., and Simons, J.

On January 16, 2013, shortly before 12:30 p.m., appellants Gaines and Mitchell and Robert Wheeler entered the Plaza Jewelers in Menlo Park wearing masks, having been driven there by appellant Bradford in a white car owned by Mitchell's mother (who was Bradford's girlfriend).

2. On page 2 of the slip opinion, in the second sentence of the second full paragraph (which begins with "Bradford and Wheeler. . . ."), "Mitchell" shall be substituted for "Bradford," so that the sentence reads,

Mitchell and Wheeler went to the glass cases at either side of the store carrying hammers and pillowcases.

3. On page 2 of the slip opinion, in the third sentence of the third full paragraph (which begins with "The white car driven by Mitchell. . . ."), the words "by Mitchell" are omitted.

4. On page 16 of the slip opinion, after the second full paragraph (which begins with "We also reject. . . ."), and before the beginning of subsection B., we add the following as a separate paragraph:

Nor do we agree that the evidence was insufficient to support a finding by the jury that appellant Mitchell acted with the "specific intent to promote, further, or assist in any criminal conduct by gang members. . . ." (§ 186.22, subd. (b)(1).) Mitchell argues that even though the jury knew he committed the charged offenses together with Gaines and Bradford, there was no "non-speculative evidence" that he knew Gaines and Bradford were gang members. But Mitchell's mother dated Bradford, they all lived in East Palo Alto and he knew his cohorts well enough to commit an attempted robbery together. A trier of fact could reasonably infer that Mitchell knew Gaines and Bradford were members of Da Vil.

The modification effects no change in the judgment.

Date:_____ _____, P.J.

Filed 1/10/19 P. v. Gaines CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. LEONARD JAMES GAINES et al., Defendants and Appellants.	A150170 (San Mateo County Super. Ct. No. SC080433)

Appellants Leonard James Gaines, Raymond Louis Bradford and Rodney Levence Mitchell were sentenced to prison after a jury convicted them of gang-related attempted robberies with the use of a firearm. They contend: (1) the court violated their right to confront the witnesses against them when it admitted case-specific hearsay evidence as part of the expert testimony on the gang allegations, in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). They further contend the case must be remanded for resentencing on the firearm allegations because they are entitled to the ameliorative effect of Senate Bill No. 620, which was enacted after their convictions in this case and which made such enhancements discretionary. Appellant Bradford argues that resentencing should extend to a five-year enhancement for a prior serious felony conviction because he is entitled to the retroactive effect of Senate Bill No. 1393, which gives the court discretion to strike the enhancement effective January 1, 2019. We find the *Sanchez* error does not require reversal, but remand the case for resentencing.

I. BACKGROUND[1]

A. *The Crime*

On January 16, 2013, shortly before 12:30 p.m., appellants Gaines and Bradford and Robert Wheeler entered Plaza Jewelers in Menlo Park wearing masks, having been driven there by appellant Mitchell in a white car owned by his mother (who was Bradford's girlfriend). Rosalba Velazquez, the owner of the store, was standing behind the front counter talking to customers and her husband, Alfonso Angulo, who worked at the store. Roberto Fierro was sitting at a desk he rented by the front door, where he conducted an insurance business.

Gaines pointed a gun at Fierro's head and said, "This is a holdup". Bradford and Wheeler went to the glass cases at either side of the store carrying hammers and pillowcases. Angulo pulled out a pistol from under the counter, chambered a round, and said something like, "All right then, assholes." One of the robbers said "Oh, shit," and they all fled the store.

Angulo and Fierro chased the robbers in Angulo's pickup while Vasquez called 911. Officers arrived within minutes and also chased the robbers. The white car driven by Mitchell crashed into a utility pole. Gaines, Bradford, Mitchell and Wheeler were eventually apprehended and physical evidence and cell phone records linked them to the crime.

B. *The Charges*

The San Mateo District Attorney filed an amended information accusing Gaines, Bradford, Mitchell and Wheeler of three counts of attempted robbery (Pen. Code, § 664, 212.5, subd. (c)),[2] with criminal street gang and firearm enhancements (§ 186.22, subd. (b), 12022.53, subs. (b), (e)). Gaines was also alleged to have possessed a firearm having suffered a prior felony conviction, and Bradford was alleged to have prior convictions and prison priors. (§ 29800, 667, subd. (a), 667.5, subd. (b), 1170.12.) Wheeler, who

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[1] Because appellants do not challenge their underlying convictions, we state the facts relating to the attempted robberies in abbreviated form.

[2] Further statutory references are to the Penal Code unless otherwise indicated.

had significant health problems relating to a heart attack he suffered after his arrest, pled guilty in exchange for time served.

C. *Trial*

A bifurcated jury trial of appellants was held. After the jury returned verdicts on the substantive charges, a separate trial was held on the gang allegations and firearm enhancements (which were based in part on the gang allegations). The prosecution relied in large part on the testimony of Inspector Jamie Draper of the East Palo Alto Police Department to prove the gang allegations and gang-related firearm allegations.

D. *Gang Evidence*

Inspector Draper testified about his qualifications and experience, which included 17 years as a police officer focusing on gangs. He had attended over 600 hours of gang training and provided training; had been assigned to the county-wide gang task force; had done gang patrols in areas that included East Palo Alto; had debriefed gang members on an almost daily basis; and had testified as an expert 67 times. He spent about 25 to 30 percent of his time focusing on African-American gangs in East Palo Alto and spent 65 to 70 percent of his time focusing on Norteno/Sureno gangs. His current assignment included having the responsibility at the district attorney's office of becoming familiar with the primary sets in East Palo Alto.

The three primary African-American gangs in East Palo Alto were the Da Vil gang (or Village Mob), the Taliban gang (no relation to the Afghanistan terrorist group) and the Gardens or G-Town. The Da Vil gang claimed "The Village" area or the university village. There were several locations where its members hung out, including the 2500 block of Illinois street, and they used a hand sign with their fingers extended and the ring finger folded down to spell out "Vil." Fire N Squad was a rap group associated with Da Vil. The Taliban was a violent rival of Da Vil and that rivalry has resulted in murders. Sac Street, a mixed race gang, is aligned with Da Vil.

Inspector Draper testified that the Da Vil gang had about 30 members at the high end and about 10 to 15 members who were really active. It had several primary activities, most of which centered around the making of money, and was a criminal

enterprise that engaged in narcotics sales and possession of firearms. The main benefit of being in the gang was it glamorized the lifestyle, and everybody's goal was to make money by whatever means necessary—narcotics sales, prostitution, robberies or burglaries. Violence and control over turf were part of the culture. East Palo Alto was a fairly small area, and firearms helped Da Vil be successful and fight back against the Taliban.

Inspector Draper identified three photographs in which the Da Vil sign was thrown, including one of appellant Gaines, which were taken from screen shots "from a video that was contained on a cell phone of another Village gang member named Fred Tippins." Another photograph of appellant Bradford throwing the Da Vil sign was taken from his cell phone. The third photograph was of appellant Mitchell and came from the cell phone of Gabrielle Aguirre.

The Da Vil gang identified itself through tattoos. Investigator Draper identified a photograph of one Antuan Stinson, who in Draper's opinion was a member of Da Vil, showing his right arm with the word "Da Vil" tattooed down the right forearm and "2500" tattooed down the left, a reference to the 2500 block of Illinois Street. Draper identified a photograph of Luis Mariscal, a person who in his opinion was a member of Da Vil, with "Quota Boy," "loyalty" and "2500" tattooed on his back, and the logo for the Bentley automobile and "R.I.P. Bird," the nickname of a Da Vil Gang member who was now deceased (Isaiah Pittman) tattooed on his forearm. A photograph of appellant Bradford showed the same Bentley logo, signifying "Bird," who was killed in gunfire in East Palo Alto. Loyalty was an important concept in gangs. Another photograph showed a man Inspector Draper identified as Martel Taylor throwing the hand sign for Da Vil and wearing a tee shirt that said "Rest in Peace, Jabari Banford," another deceased subject who was a member of Da Vil.

In a photograph taken from appellant Bradford's phone, Bradford and appellant Gaines appear with three other men, Lamont Coleman, Eric Valencia Vargas, and Tyrone Love Lopez, who in Inspector Draper's opinion were members of Sac Street. The Sac Street members wore clothing consistent with that gang. Other photographs showed

appellant Gaines and Bradford with men who in his opinion were members of Sac Street. A picture on appellant Bradford's phone showed a screen shot of him and a group of men who included Devon McKean and Martel Taylor, who is making the Da Vil hand sign, and which references Fire N Squad at the bottom. In another photograph taken from appellant Bradford's phone, appellant Gaines is depicted with Bradford and Devon McKean, with a reference to "movemeanmistress," "movemean" being a common term to identify the more active members of Da Vil. Another photograph showed appellant Bradford and Luis Mariscal showing disrespect to the Taliban.

Inspector Draper identified the photographs of four men—Luis Mariscal, Edward a.k.a. Bruce Grady, Jonathan Pittman and Jamar Smith—who he believed were gang members based on their tattoos and association with other members, and who were contacted within Da Vil territory by Menlo Park's narcotics enforcement team in a vehicle on February 18, 2010. Grady was convicted of possession of a firearm, Smith of possessing marijuana for sale and being an active member of a criminal street gang, and Pittman was convicted of a drug offense and possession of a firearm by a felon.

Inspector Draper testified that in March 2010, a search warrant was executed at the home of Fredderick Smith, a member of Da Vil, and police located multiple firearms and cocaine base packages. There was also some mail from Da Vil members including Luis Mariscal and Albert Feaster. An example of Fredderick Smith's gang affiliation could be found in a photograph with other Da Vil members Forestt Granger, Jonathan Pittman, and Edward Lewis; three of them were throwing the Da Vil gang sign. Fredderick Smith was convicted of possession of rock cocaine and possession of a firearm by a felon.

In a photograph recovered from appellant Bradford's cell phone, Bradford appeared with Luis Mariscal and Robert Wheeler, who was involved in the attempted robbery charged in this case, and Devon McKean, who was also a member of Da Vil. In a photograph recovered from Frederick Tippins's phone, Da Vil members appeared including Michael McNak, Marcus Anderson, Darryl McKean, appellant Bradford, Edward Bruce Grady, Demetrius Crayton, Devon McKean, Albert Mitchell and Frederick Tippins. Inspector Draper had researched their histories and was confident of his opinion

that they were gang members. Scederick Tippins, the twin brother of Frederick Tippins, was also a Da Vil member and was murdered in June 2012, and his pallbearers were members of Da Vil. In another photo collage taken from Frederick Tippins's phone, deceased members of Da Vil were depicted.

Tywaun Livingston was a member of Da Vil based on his numerous prior contacts and appearance in photos and videos with people who were members, as well as his involvement in several criminal incidents. Livingston appeared in a photograph with Demetrius Crayton and Albert Mitchell, who were also in a photograph of Scederick Tippins's funeral. Both were displaying the Da Vil hand sign. In a photo taken at Livingston's residence, there was a CD that said, "The Village Sounds" and a hat that said "R.I.P. my Brother Box" (referring to Da Vil member Brandon Bradford, who was murdered). Appellant Gaines had numerous prior contacts with Livingston. Another photograph showed Livingston, David Walker and a subject named Deray making the sign for Da Vil. A memorial collage of deceased Da Vil gang members was found in Frederick Tippins's cell phone. Possession of these photographs supported Inspector Draper's opinion that Frederick Tippins was a gang member, and that there was a violent rivalry between the Taliban and Da Vil.

Livingston was convicted of possession of a firearm based on an incident on December 14, 2011 in which he was in the passenger seat during a traffic stop and was suffering from a gunshot wound. Earlier that evening, Brandon Bradford was shot and killed while Livingston and appellant Gaines were present. On December 18, 2011, the Menlo Park Police Department was dispatched to a call in an area controlled by the Taliban and one of six or seven subjects fired shots at an officer while fleeing. Several firearms, as well as Da Vil members Breen Hawkins, Frederick Tippins, Edward Lewis, Patrick Tharp and Luis Mariscal were found inside the perimeter. During another incident on June 25, 2012, Livingston was stopped while driving and he assaulted officers (including Inspector Draper) with his vehicle. He was convicted of three counts of assault on a police officer. Assault with a deadly weapon was one of the primary activities of Da Vil.

Inspector Draper had had discussions with Darnell McKean, a former member of Da Vil, who had left the gang willingly and had talked to investigators about the gang lifestyle. He had reviewed the statements of active members like Eric Jones. Jail inmates were given a classification interview to determine their gang membership, and Eric Jones stated during one such interview that he was a member of Da Vil; Inspector Draper had taken these statements into account when reaching his opinion regarding Da Vil and its rivalries. Similar statements had been made by other members of Da Vil, including Jabari Banford, who expressed his hatred of the Taliban group.[3]

In Inspector Draper's opinion, appellant Bradford was a member of Da Vil, based on his involvement with other members, his prior contacts, photos and videos in which he displayed the gang's hand sign, some of his tattoos, and his use of the Bentley symbol. In a photograph recovered from Frederick Tippins's phone and taken after Scedrick Tippins's funeral, Bradford appeared with other gang members wearing a "Mobbing in Peace" shirt and making the Da Vil hand sign. Michael McNack, one of Da Vil's primary rap artists, was also in the photograph. Other photographs taken from Bradford's phone and Instagram account show him associating with other gang members and making gang signs. In one, it says, "Throw back the Village, lmao, that's out #boxteam #movemean who I do it for," which in Draper's opinion was him saying his gang lifestyle was for the village. It also appeared to Draper that Bradford had created a Facebook page purporting to be somebody associated with the Taliban.

In Inspector Draper's opinion, appellant Mitchell was at the very least an associate of the Da Vil gang and might be a member, based on his involvement in the charged offenses, his association with other members and his use of the Da Vil hand sign in a photograph recovered from Gabrielle Aguirre's phone. Aguirre had said during an

[3] Appellants objected to admission of these statements on *Crawford* grounds. They were overruled and deemed by the court to be continuing objections.

interview for this investigation that Mitchell was "cliqued up" with others from the Da Vil area, which was terminology for being associated with or a member of a gang.[4]

In Inspector Draper's opinion, Robert Wheeler was an associate or member of Da Vil based on his association with gang members and his prior gang-related convictions. Appellant Gaines was a member based on his multiple contacts in the company of other members, his tattoo of a deceased gang member on his arm, his presence in photos and videos with gang members, his rapping and his conviction for a 2012 possession of a firearm in Da Vil territory. Inspector Draper identified a video of appellant Gaines as Tywaun Livingston rapping in a Da Vil area.

In Inspector Draper's opinion, members of Da Vil committed crimes together to build loyalty and build a reputation. Active members of Da Vil might commit crimes with someone who was an associate but not a full-fledged member if they trusted him, or if he was trying to show his worth or increase his status.

E. *Verdict and Sentence*

The jury returned a verdict finding the enhancements to be true. Bradford admitted the prior conviction and prison prior allegations against him. Appellant Gaines was sentenced to prison for 20 years, consisting of the two-year middle term for one of the attempted robberies and a firearm enhancement of 10 years attached to that count, plus eight months each consecutive (one-third the middle term) for the remaining two counts, plus firearm enhancements of three years, four months each (one-third the term) attached to those counts. Appellant Bradford was sentenced to prison for 30 years and four months, consisting of six years (double the base upper term) for one attempted robbery count plus a gang/firearm enhancement of 10 years, and one year and four months consecutive (double one-third the middle term) on the remaining two counts plus firearm enhancements of three years, four months each attached to those counts, plus five years for serious prior felony enhancement. Appellant Mitchell was sentenced to prison

[4] A defense objection based on *Crawford* and reliability was overruled.

for 12 years, consisting of the two-year middle term on one of the attempted robbery counts plus 10 years for the firearm/gang enhancement attached to that count, the remaining counts to run concurrently. The gang enhancements under 186.22, subdivision (b) were stricken. (See § 12022.53, subd. (e)(2).)

II. DISCUSSION

A. *Expert Testimony Regarding Gangs*

Appellants contend the gang allegations under section 186.22, subdivision (b) and the firearm allegations under section 12022.53, subdivision (e) must be reversed because they are based on case-specific hearsay testified to by the gang expert, in violation of *Sanchez*, *supra* 63 Cal.4th 665. The Attorney General acknowledges that case-specific hearsay was introduced, but argues we should find the error harmless. We agree.

1. Background

The Sixth Amendment to the federal Constitution guarantees a defendant's right to confront adverse witnesses. (U.S. Const., 6th Amend.; *People v. Lopez* (2012) 55 Cal.4th 569, 576.) In *Crawford*, the United States Supreme Court held that the prosecution may not rely on testimonial hearsay unless the declarant is unavailable to testify, and the defendant had a prior opportunity for cross-examination. (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 9.) " 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).)

The gang enhancement under section 186.22, subdivision (b)(1) applies when an individual is "convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. . . ." Under section 12022.53, subdivision (e), the firearm enhancements provided in that section "shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B)

Any principal in the offense committed any act specified in subdivision (b), (c), or (d). [¶] (2) An enhancement for participating in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of that offense."

As the jury in this case was instructed, to establish that a group is a criminal street gang, " 'the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity.' [Citation.] 'A "pattern of criminal gang activity" is defined as gang members' individual or collective "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated "predicate offenses" during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons. [Citations.] The charged crime may serve as a predicate offense [citations], as can "evidence of the offense with which the defendant is charged and proof of another offense committed on the same occasion by a fellow gang member." ' [Citation.] The prosecution need not prove, however, that the predicate offenses used to establish a pattern of criminal activity were gang related." (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 581 (*Ochoa*).)

When this case was tried, it was common for gang experts to testify to hearsay matters relating to gangs and allow the trier of fact to use those statements to assess the value of the expert's opinion. (*Sanchez*, *supra*, 63 Cal.4th at p. 679.) Appellants nonetheless filed an in limine motion to exclude several aspects of gang expert testimony, including those hearsay statements that were "testimonial" in nature and violated *Crawford*. An Evidence Code section 402 hearing was held solely on the hearsay statements to be relied upon by Inspector Draper to ensure they were sufficiently reliable. Inspector Draper testified to having learned of the prior crimes by gang members through

police reports, with one exception—a June 25, 2012 incident in which he was personally involved in an effort to box in a stolen car driven by Tywaun Livingston. Draper indicated that he was relying on certain police reports and statements made by individuals during their jail interviews for his expert testimony that he believed appellants Gaines and Bradford to be members of the Da Vil gang. The trial court ruled the vast majority of the hearsay information reliable and indicated that Draper could relate the information to the jury. Draper testified as outlined above, and subsequent *Crawford* objections to his testimony were deemed to be continuing objections and overruled.

In *Sanchez*, decided after the trial in this case, the California Supreme Court held that an expert witness cannot in conformity with the Evidence Code "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez, supra,* 63 Cal.4th at p. 686.) Experts "may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that [they] did so," but they may not tell the jury the particulars of that hearsay. (*Id*. at p. 685.) *Sanchez* also held that, in criminal cases, "there is a confrontation clause violation" when a prosecution expert seeks to relate testimonial hearsay "unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id*. at p. 686.) Case-specific out-of-court statements conveyed by the prosecution's gang expert constituted inadmissible hearsay under state law, and to the extent they were testimonial, ran afoul of *Crawford*. (*Ibid.*)

The *Sanchez* court distinguished between an expert's testimony as to general background information and case-specific facts. Case-specific facts are "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra*, 63 Cal.4th at p. 676.) An expert may testify about generalized information, even if technically hearsay, in order to help jurors understand the significance of case-specific facts, or the expert may offer an opinion about what certain case-specific facts mean. (*Ibid*.) "The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge." (*Ibid*.) The court

gave several examples of the distinction between generalized and case-specific information, one of which pertains directly to gang experts: "That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to a gang." (*Id.* at p. 677.)

If an expert testifies as to case-specific out-of-court statements, the statements are only admissible if they fall within an applicable hearsay exception. (*Sanchez, supra*, 63 Cal.4th at p. 684.) "Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Ibid*.) As clarified in *Sanchez*, a court's task in evaluating out-of-court statements under hearsay rules and *Crawford* is two-fold: "The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations on unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." (*Id.* at p. 680.) Hearsay statements are considered testimonial if they are made "primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Id*. at p. 689.)

Improper admission of testimonial hearsay in violation of a defendant's right to confront witnesses against him is an error of constitutional magnitude and requires reversal unless the error is harmless beyond a reasonable doubt. (*Sanchez, supra*, 63 Cal.4th at p. 698; see *Chapman v. California* (1967) 386 U.S. 18, 24.) If non-testimonial

hearsay is improperly admitted, the error is a violation of statutory law and is subject to the state standard for assessing prejudice. (*People v. Stamps* (2016) 3 Cal.App.5th 988, 997.) Under that standard, reversal is required only if it is reasonably probable that a result more favorable to the defendant would have been achieved in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. Analysis

The Attorney General agrees that some of Inspector Draper's testimony was inadmissible and fell within the category of testimonial hearsay. He argues the error was harmless beyond a reasonable doubt because overwhelming admissible evidence was also admitted to prove the gang and gang-related firearm enhancements and the inadmissible evidence had no impact on the verdict. To assess this claim, we must determine what was admissible and what was not.

We begin with the evidence which was indisputably inadmissible. Inspector Draper testified that Gabrielle Aguirre had said during an interview with detectives on this case that appellant Mitchell was "cliqued up" with people from Da Vil, and that appellant Bradford's girlfriend, Germina Sturns, testified previously that Bradford had said he hates the Taliban and is a member of the Da Vil gang. The Attorney General agrees these statements were testimonial hearsay. But he argues that the evidence was largely cumulative of admissible, non-hearsay testimony based on the significance of hand signs and tattoos that were depicted in several photographs, including numerous photographs of the appellants introduced in this case. (*Sanchez* at p. 677.)[5]

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[5] Inspector Draper also testified to statements made by Da Vil gang members during jail classification interviews in which they either admitted gang membership explicitly or said they hated members of the Taliban and did not want to be housed with them. These statements were hearsay, and their details should not have been admitted even if Draper relied on them in reaching his opinions. (*Sanchez, supra*, 63 Cal.4th at p. 686; *Ochoa, supra,* 7 Cal.App.5th at p. 581.) But they were not established to be *testimonial* hearsay amounting to a Sixth Amendment violation because the interviews' primary purpose was to further institutional objectives and they were not created as a substitute for trial testimony. (See *People v. Leon* (2016) 243 Cal.App.4th 1003, 1020 [statements made during jail classification interviews were not testimonial under Sixth Amendment];

This jury would have inevitably seen photographs of the appellants sporting tattoos, throwing gang signs, rapping and associating with other young men and showing their affinity toward the Da Vil gang. (See *People v. Garton* (2018) 4 Cal.5th 485, 506; *People v. Cooper* (2007) 148 Cal.App.4th 731, 746 [photographs and videos are demonstrative evidence not hearsay]; cf. *People v. Martinez* (2018) 19 Cal.App.5th 853, 861–863 [finding *Sanchez* error in gang case prejudicial where there was no non-hearsay evidence of defendant's gang membership and little evidence supporting gang expert's opinion that the defendant was gang member].) Appellants' affinity for that group was not in serious dispute. Additionally, *Sanchez* permitted Inspector Draper's background testimony about gangs in general and the operations of Da Vil in particular, so long as he did not relate the details of case-specific hearsay. (*Sanchez, supra*, 63 Cal.4th at p. 686; see *People v. Vega-Robles*, *supra*, 9 Cal.App.5th at pp. 410–413 (*Vega-Robles*); *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175, review granted on other grounds March 22, 2017, S239442.)

Inspector Draper *did* relate the details of several prior specific instances involving crimes committed by the Da Vil gang of which he had no personal knowledge, including a February 18, 2010 incident involving the arrest and subsequent conviction of three Da Vil gang members (Bruce Grady, Jamar Smith and Jonathan Pittman) on drug- and weapons-related charges; a March 2010 incident in which the home of Frederrick Smith was searched and he was subsequently convicted of possessing rock cocaine and a firearm; a December 2011 incident in which Tywaun Livingston was found suffering from a gunshot wound on the same day that Brandon Bradford was shot and killed; and a December 18, 2011 incident in which shots were fired at officers and several firearms were found. As the Evidence Code section 402 hearing makes clear, Inspector Draper learned of these incidents through police reports, which constitute testimonial hearsay.

People v. Vega-Robles (2017) 9 Cal.App.5th 382, at p. 415.) Similarly, Inspector Draper relied on statements by former and current members of Da Vil in formulating his opinions in this case; the record does not establish that these statements were testimonial.

(See *Sanchez*, *supra*, 63 Cal.4th at p. 694; *Vega-Robles*, *supra*, 9 Cal.App.5th at p. 410.) Moreover, Inspector Draper's opinion that these other individuals were gang members was based in part on photographs (nonhearsay), but it was apparently also based in part on hearsay sources.

This court has previously held that the gang membership of individuals other than the defendant(s) in a case is a case-specific fact to which the *Sanchez* rule applies. (*Ochoa*, *supra*, 7 Cal.App.5th at p. 583; see also *People v. Lara* (2017) 9 Cal.App.5th 296, 337 (*Lara*) [predicate acts are case-specific facts]; but see *Meraz*, *supra*, 6 Cal.App.5th at pp. 1174–1175 [predicate acts are background information rather than case-specific facts].) The question is, given the extensive photographic evidence and background testimony about the Da Vil gang, which proved appellants' affiliation with that group, was the inadmissible evidence harmless? We conclude the answer is yes.

The evidence regarding the prior offenses by Da Vil members was relevant to whether the prosecution had established the requisite predicate acts and whether Da Vil was therefore a criminal street gang. But appellants' own conduct in committing the charged attempted robberies (not challenged in this appeal) would have been sufficient to establish the "pattern of criminal gang activity" required to support the section 186.22 enhancement. (*Ochoa*, *supra*, 7 Cal.App.5th at p. 581.) Because there was overwhelming evidence that Bradford and appellant were Da Vil members, even if the evidence was less clear as to appellant Mitchell's status, the charged offenses qualified as predicate offenses for purposes of the enhancement. (*Ibid*.)

In addition to the so-called predicate offenses, the prosecution was required to prove that the "primary activity" of the gang was the commission of enumerated offenses. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) Inspector Draper opined that Da Vil's primary activities included money-making activities such as narcotics sales and the possession of firearms. " '[U]nder state law after *Sanchez*, [the expert officer] was permitted to testify to non-case-specific general background information about [the gang], its rivalry with [another gang], its primary activities, and its pattern of criminal activity, even if it was based on hearsay sources like gang members and gang officers.' "

(*Vega-Robles, supra*, 9 Cal.App.5th at p. 411, quoting *Meraz, supra*, 6 Cal.App.5th at pp. 1174–1175.)

Appellants argue the trial court erroneously instructed the jurors to consider the hearsay evidence considered by Inspector Draper to assess his opinion and at the same time admonished them not to consider that evidence for the truth of the matter asserted. This practice was criticized in *Sanchez*, which recognized that jurors "cannot logically follow these conflicting instructions. They cannot decide whether the information relied on by the expert 'was true and accurate' without considering whether the specific evidence identified by the instruction, as upon which the expert based his opinion, was also true." (*Sanchez*, *supra*, 63 Cal.4th at p. 684.) Given the extensive photographic evidence and background testimony and the fact the charged offenses would suffice for predicate acts in this case, we find it is not reasonably probable the jury's finding was affected by the conflicting instructions. (*Vega-Robles, supra*, 9 Cal.App.5th at p. 417.)

We also reject the argument that the evidence was insufficient to support the gang allegation because the evidence did not show Da Vil was a criminal street gang. Inspector Draper's expert testimony was sufficient to establish Da Vil was a criminal street gang. (*People v. Margarejo* (2008) 162 Cal.App.4th 102, 108.) The case of *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611–612 is inapposite because there was no testimony in that case that the commission of qualifying offenses was a "primary activity" of that gang.

B. *Firearm Enhancements*

The trial court imposed firearm enhancements under section 12022.53, subdivision (b) and (e) against appellant Gaines and under section 12022.53, subdivision (e) against appellants Bradford and Mitchell. At the time of sentencing in this case, in 2016, trial courts did not have the discretion to strike enhancements under section 12022.53. (Former § 12022.53, subd. (h).) On October 11, 2017, Governor Brown signed Senate Bill No. 620 (2017-2018 Reg. Sess.), which amended sections 12022.5 and 12022.53 to provide trial courts with the discretion to strike a firearm enhancement or finding. (Stats 2017, ch. 682.) Senate Bill No. 620 added the following language to both statutes: "The

court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats 2017, ch. 682, §§ 1–2.)

Appellants contend, and the Attorney General agrees, that the amendments to section 12022.53 applies to their cases, which are not yet final. (See, e.g., *People v. Mathews* (2018) 21 Cal.App.5th 130, 132–133.) We remand all three cases to the trial court so the court can consider exercising its discretion to strike the firearm enhancements. (*In re Estrada* (1965) 63 Cal.2d 740, 744–745; *People v. Francis* (1969) 71 Cal.2d 66, 75–79.) We express no opinion as to how the court should exercise that discretion on remand.

C. *Prior Serious Felony Conviction Enhancement*

Appellant Bradford's sentence includes a five-year enhancement under section 667, subdivision (a). At the time of sentencing, the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Former § 1385, subd. (b).) On September 30, 2018, the Governor signed Senate Bill No. 1393 which, effective January 1, 2019, amends sections 667, subdivision (a) and 1385, subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)

In supplemental briefs, appellant Bradford contends he is entitled to resentencing after the statute's effective date so the court can exercise its discretion to strike the prior conviction. We agree, and direct the trial court to consider Bradford's five-year enhancement on remand for resentencing. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971–974.) We disagree with the Attorney General that remand for this purpose is unnecessary because the record clearly indicates the court would not have exercised its discretion to strike the enhancement in any event. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Again, we express no opinion as to how the trial court should exercise its newfound discretion and will leave it to the trial court to make that

determination in the first instance. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425–428.)

III. DISPOSITION

The judgment is affirmed. The case is remanded for resentencing.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

(A150170)